

STATE OF HAWAII  
BEFORE ARBITRATOR LOUIS MICHAEL CHING, ESQ.

In the Matter of the	)	Grievance of .....
Arbitration Between:	)	
	)	
UNITED PUBLIC WORKERS, AFSCME,	)	
LOCAL 646, AFL-CIO,	)	ARBITRATOR'S DECISION
	)	
Union,	)	and
	)	
and	)	FINAL AWARD
	)	
STATE OF HAWAII, Department of	)	
PUBLIC SAFETY, .....	)	
	)	
Employer.	)	
	)	
	)	
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LOUIS MICHAEL CHING, ARBITRATOR

The United Public Workers, AFSCME, Local 646 ("Union") challenges the termination of the Grievant, Adult Corrections Officer ("ACO") ....., effective the close of business ....., by the Employer, the State of Hawaii, Department of Public Safety, ....., (sometimes referred to here as "PSD"), in accordance with Title 14, Administrative Rules, State of Hawaii Personnel Rules, Section 14-14-14(a)(2).

## I. Issues.

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The Union contends that the Employer's termination of Grievant pursuant to Administrative Rule Section 14-14-14(a)(2) violate section 11.01 of the Unit 10 collective bargaining agreement between the Union and the State of Hawaii, and that the Employer must follow the bargained-for and negotiated contractual provision--Section 11. The Employer responds that the Grievant was not disciplined, but even if the Grievant's termination is viewed as discipline, the discipline was for just and proper cause. The specific issues to be addressed are:

1. Was the Grievant's termination pursuant to Administrative Rule Section 14-14-14(a)(2) on ..... a violation of the contract?

2. If so, what is the appropriate remedy?

## II. Background

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### A. Facts.

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The Grievant began work as an ACO in ..... Just a few months later, on ....., as ..... was entering a cell to take ice to an inmate, the cell door closed on her neck and head, causing head, neck and back injuries. The undisputed facts are essentially that Grievant had sustained an industrial related

injury which resulted in lengthy periods of disability and recurrent absences. The treatment for that injury required a psychologist and a physician.

There are some disputed facts, however, essentially, on or about October 17, 1997, the Grievant failed to report to work. Shortly thereafter, the Grievant was contacted first by telephone and then in writing over the next couple of weeks by ....., Chief of Security, and the Warden at ....., who inquired as to Grievant's intentions to return to work. The Grievant had already exhausted her sick leave and vacation leave and was on unauthorized leave without pay status. The Grievant informed them that she intended to return to work. However, according to the Chief of Security, the Grievant did not return to work on two separate dates stated to him by Grievant. As of December 17, 1997, the Grievant still had not shown up for work, and so the Warden recommended to the Departmental Director that the Grievant be terminated. On December 8, 1997, the Grievant was notified that she would be terminated effective the close of business December 23, 1997 and she was offered the opportunity to respond at a meeting with ..... on December 19, 1997. The Grievant's Union representative asked that the December 19, 1997 meeting be postponed for the benefit of the Grievant. The pre-termination hearing was held on December 22, 1997.

As a result of the December 22, 1997 hearing, the Employer postponed the Grievant's termination in order to allow her time to submit documentation of her claimed incapacity to work. On January 5, 1998, ..... wrote to the Grievant reminding the

Grievant to forward the needed medical documentation. On January 21, 1998, the Grievant forwarded a note dated December 23, 1997, from Dr. . . . . , Ph.D., that stated that the Grievant had been psychologically disabled in regard to her job since October 15, 1997. In a letter dated January 22, 1998, . . . . . asked for additional information from Dr. . . . . . Dr. . . . . . replied in a letter dated February 2, 1998, that he had seen the Grievant from August 1995 to December 1995, again for one session on August 22, 1996, from April 23, 1997 to July 25, 1997, and finally, from December 1, 1997 to January 7, 1998. Dr. . . . . . had not seen the Grievant between July 25, 1997, and December 1, 1997. In a letter dated . . . . . , the Grievant was informed that she was terminated effective . . . . .

#### B. Procedural History.

The Grievant, an Adult Corrections Officer ("ACO") employed at the . . . . . , Department of Public Safety ("PSD"), was terminated from employment on . . . . . pursuant to Title 14, Administrative Rule, Section 14-14-14 (a) (2), because she failed to report to work for more than fourteen days and did not provide satisfactory reasons within those fourteen days.

The Grievant filed a step 2 grievance on March 6, 1998 alleging violations of the Unit 10 Collective Bargaining Agreement ("CBA"). The Department denied the grievance in a step 2 letter dated April 7, 1998.

The Grievant submitted a step 3 appeal letter dated March 25, 1998. The grievance was denied in a step 3 response dated April 15, 1998. The Union requested arbitration by letter dated April 30, 1998.

A hearing in this arbitration was held on June 26, 1998. The parties were ably and well represented by David M. Hagino, Esq., for the Grievant and Union, and James Halvorson, Esq. for the Employer. The Employer called as its witnesses ....., ....., and ..... The Union called the Grievant and ..... After filing of closing memoranda, the award is filed within the time fixed by agreement of the parties.

### III. Positions of the Parties.

#### A. Union's Position.

The Union asserts that the Employer should have followed the bargained-for and negotiated contractual provision--Section 11. That the Employer has chosen to maintain a disciplinary approach based upon a unilateral action which conflicts with Section 11 of the contract. The Union contends that the Employer's unilateral change in the disciplinary procedure in this case cannot be permitted to stand. An employer may be disciplined, but it should be in conjunction with a progressive discipline policy. In that case, Grievant would have been permitted two hearings. This Grievant should have been given a written warning or, at

most, a small suspension for the current offense. In the alternative, Grievant could have been placed on a sick leave abuse program.

#### B. Employer's Position.

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The Employer asserts that the Grievant was not disciplined. The Grievant was terminated because she had not reported to work for fourteen days and she failed to provide satisfactory reasons to the appointing authority within those fourteen days as prescribed in Section 14-14-14 of the State Personnel Rules. Further, even if the Grievant's termination is viewed as discipline, the discipline was for just and proper cause.

### IV. Analysis

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- A. THE GRIEVANT'S TERMINATION PURSUANT TO ADMINISTRATIVE RULE SECTION 14-14-14(a)(2) ON ..... WAS NOT A VIOLATION OF THE UNIT 10 COLLECTIVE BARGAINING AGREEMENT. FURTHER, EVEN IF THE GRIEVANT'S TERMINATION IS VIEWED AS DISCIPLINE, THE EMPLOYER DID FULLY COMPLY WITH THE LETTER AND SPIRIT OF THE UNIT 10 COLLECTIVE BARGAINING AGREEMENT.

The Employer called as witnesses, ....., ....., and ..... Each of the aforementioned witnesses' testimonies were found to be credible. The Union called as witnesses, the Grievant and ....., and it introduced evidence from Dr. ....., Ph.D.

The Employer strictly complied with the requirements provided in the Administrative Rules, Section 14-14-14 (a) (2) in terminating Grievant. Further, the Employer took additional steps to provide the Grievant with the opportunity to respond to the charges against her during the investigation. She was given the opportunity to appear at a pre-termination hearing where she was able to present matters on her own behalf. Finally, the Grievant was afforded the opportunity to contest her dismissal at steps 2 and 3 of the grievance process to this arbitration.

- B. THE GRIEVANT'S KNOWN EXISTING DEPRESSIVE MENTAL CONDITION LIKELY CONTRIBUTED TO HER FAILURE IN MAINTAINING CONTINUOUS PSYCHOLOGICAL COUNSELING AND CONTRIBUTED TO HER FAILURE IN FULFILLING HER RESPONSIBILITIES TO HER EMPLOYER IN REPORTING TO WORK.

One fact that remained very clear here was that prior to October 17, 1997, the Grievant was experiencing a mental depressive condition which required her to be seen by a psychologist, Dr. ...., Ph.D. The Employer was well aware of the Grievant's physical and psychological condition prior to October 17, 1997. The etiology of the Grievant's depression is not an issue here, but the result of the, Grievant's depression caused her to exercise very poor judgment in dealing with her employer, supervisor, coworkers, job attendance, and follow-up compliance with her psychological appointments. It is also very clear from the Grievant's conduct that she herself probably was not sure whether she wanted to continue her employment under her then current employment condition, to wit, an adverse working

environment created by co-workers and supervisors. However, it seems reasonable here that the Grievant still wished to work as an ACO as evidenced by her statement to her supervisor that she intended to return to her job.

This arbitrator fully agrees with the Employer that an arbitrator should not substitute his own judgment as to the appropriate disciplinary action for that of the employer absent compelling evidence that the employer has abused its discretion. Initially, it appeared reasonable that the Employer was not satisfied with Dr. .... opinion that the Grievant was psychologically disabled from October 15, 1997, since Dr. .... had not seen the Grievant between July 25, 1997 and December 1, 1997. However, under the circumstances, the Employer was well aware of the Grievant's physical and psychological condition which had resulted in recurrent extended periods of disability and absences prior to October 17, 1997. The Employer appeared more concerned that the Grievant had not been seen by Dr. .... or any other medical provider during said absence period. However, the Employer was unreasonable given the Grievant's extensive medical history known to the Employer to conclude that the Grievant did not continue to experience a physical and/or psychological condition which may have impaired the Grievant's ability to return to work. To the contrary, it appeared that the Grievant continued to experience a depressive mental condition throughout said relevant period which clearly compromised the Grievant's judgment.



Clearly, this is not a case where an employee simply does not report to work for fourteen days, and his or her employer is unaware of any reason for the absence. This is a case where an individual is shown to be experiencing an ongoing depressive mental condition, who fails to keep her medical appointments with her psychologist, and is terminated on the basis that her psychologist rendered an opinion excusing her absence during a period of time when she had not been seen by any medical provider. Plainly stated, Grievant was not seen by a medical provider during her unexcused absence, but she nevertheless continued to experience a depressive mental condition which likely affected her judgment and contributed to her failure to maintain continuous psychological counseling.

Therefore, while the Grievant did not report for work after October 17, 1997, under the special circumstances here, the Employer was already aware of physical and/or psychological reasons which would have satisfied excusing her absence under Title 14, Administrative Rules, Section 14-14-14(a)(2). Accordingly, termination under Article 11 of the Collective Bargaining Agreement also appears unreasonable in light of all the aforementioned facts and circumstances. However, this decision should not in any way be construed to place the burden upon the employer to discover the reason(s) behind an employee's absence in any future termination case, and/or notwithstanding any applicable law, rule or contract terms.

However, the Grievant's exercise of poor judgment in carrying out her responsibilities to her employer is not condoned

or excused here. Her own action or lack of action in 1997 resulted in her termination and absence from her job for nearly two years which she will not receive compensation for and which has resulted in untold hardships upon herself and her family.

#### V. Final Award.

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The Arbitrator recognizes that the Employer has acted in good faith. However, the Grievant will be reinstated for all the aforementioned reasons.

NOW THEREFORE IT IS ADJUDICATED, DECLARED AND ORDERED that

1. The grievance of the Union is sustained in part and denied in part;
2. The Discharge is set aside and the Grievant shall be reinstated as an ACO with the Department of Public Safety within 60 days or sooner from the date of the notarization of this decision and award;
3. Notwithstanding any laws, rules, contract terms, or employment policy, the Grievant must obtain a medical release to return to work prior to reinstatement;
4. Upon reinstatement, the Grievant shall be placed upon probation for a period not to exceed SIX (6) Months from the date of reinstatement;
5. The Employer shall NOT be permitted to assign the Grievant to a permanent work position at ..... located at ....., State of

Hawaii, for a period of up to ONE (1) year from the date of reinstatement. This Order does not preclude the Grievant from entering ..... or the Employer from assigning the Grievant to a temporary work position at ..... or for any emergency situation arising at ..... or for security and/or transportation of inmates to and from ..... Further, the Grievant may elect to waive or void this Paragraph 5 in its entirety without affecting any other portion or paragraph of this Decision and Final Award, provided the Grievant signs and dates a written waiver or statement acknowledging that she wishes to waive or void Paragraph 5 as part of the Order in this Decision and Final Award;

6. Notwithstanding any worker's compensation benefits to which the Grievant might be entitled to under Chapter 386, HRS, the Grievant is NOT entitled to any Back Pay or any ancillary employment benefits, including but not limited to fringe benefits, seniority benefits, retirement credits, vacation and sick leave benefits, from ..... until reinstatement;
7. The records and files pertaining to this matter may be retained in the Grievant's personnel records;
8. This award is in full and final determination of all claims submitted to the arbitration. All claims not specifically addressed are deemed denied.
9. The Arbitrator shall retain jurisdiction over this matter in order to assist the parties in the interpretation, application, and compliance with this decision.

ORDERED this 28th day of June, 1999.

/S/ LOUIS MICHAEL CHING, ARBITRATOR

STATE OF HAWAII )  
 : SS.  
CITY AND COUNTY OF HONOLULU )

On this 28th day of June, 1999, appeared LOUIS MICHAEL CHING, to me personally known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

Notary Public, State of Hawaii  
My Commission expires: 4-18-2001  
Justine C. Cavrigo